Supreme Court, U.S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

No. 80-477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AD HOC '78 and T. MILTON STREET, et al.,

vs.

ROUSE PHILADELPHIA, INC.,

and

GIMBEL BROTHERS, INC.; GIMBEL BROTHERS REALTY CORP.,

and

REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Motion of Amicus Curiae for Leave to File Brief in Support of Petition for Writ of Certiorari and Brief Amicus Curiae

WILLIAM T. COLEMAN, III,
Pepper, Hamilton & Scheetz,
2001 The Fidelity Building,
Philadelphia, Pennsylvania 19109
(215) 893-3000

Attorney for Amicus Curiae,
American Civil Liberties
Foundation of Pennsylvania,

Of Counsel:
ALLAN R. STEIN,
Pepper Hamilton & Scheetz,
2001 The Fidelity Building,
Philadelphia, Pennsylvania 19109

THOMAS B. HARVEY, JR.,
American Civil Liberties
Foundation of Pennsylvania,
260 South 15th Street,
Philadelphia, Pennsylvania 19102

Pennsylvania Appellate Printing Co.—Call Toll Free—1(800) 526-7560

TABLE OF CONTENTS

Motion of Amicus Curiae for Leave to File Brief in Support of Petition for Writ of Certiorari 1

Brief of Amicus Curiae in Support of Petition for Writ of Certiorari 3

Summary of Argument 3

Argument 5

Conclusion 13

CASES CITED:

American Radio Association v. Mobile Steamship Association, 419 U.S. 215 (1974) 11

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 11

Carey v. Brown, 100 Sup. Ct. 2286 (1980) 10, 11

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 8

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 10

Henry v. First National Bank, 595 F.2d 291 (5th Cir. 1979) 7

Hughes v. Superior Court, 339 U.S. 460 (1950) 4, 5

International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957) 10

TABLE OF CONTENTS

CASES CITED:

Missouri v. National Organization for Women,
620 F.2d 1301 (8th Cir.), cert. denied, 49
U.S.L.W. 3216 (U.S. October 7, 1980) 7

Police Department v. Mosely,
408 U.S. 92 (1972) 8

Thornhill v. Alabama,
310 U.S. 88 (1940) 6, 8, 9

United States v. O'Brien,
391 U.S. 367 (1968) 7

AUTHORITIES CITED:

T. Emerson, The System of Freedom of Expression
(1970) 10

L. Tribe, American Constitutional Law (1978) 9

No. 80-477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

AD HOC '78 and T. MILTON STREET, et al.,

vs.

ROUSE PHILADELPHIA, INC.,

and

GIMBEL BROTHERS, INC.;
GIMBEL BROTHERS REALTY CORP.,

and

REDEVELOPMENT AUTHORITY OF THE
CITY OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT
OF PENNSYLVANIA

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

American Civil Liberties Foundation of Pennsylvania (ACLF) respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorneys for the respondents was requested but refused.

The interest of the ACLF in this case arises from ACLF's belief that the lower court rulings impair the

ability of the citizens of Pennsylvania to exercise freely their first amendment rights. ACLF, an affiliate of the American Civil Liberties Union, is a non-profit corporation dedicated to the vindication of constitutional liberties in Pennsylvania. It is accordingly in ACLF's interest for this Court to grant *certiorari* and review the propriety of the lower court rulings.

The attached brief contains a more thorough discussion than petitioner's brief of when a state may restrain picketing for an unlawful purpose. *Amicus* believes this issue will be dispositive of the instant controversy.

Respectfully submitted,

/s/ William T. Coleman, III
WILLIAM T. COLEMAN, III
Pepper, Hamilton & Scheetz
Counsel for American Civil Liberties Foundation of Pennsylvania

No. 80-477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

AD HOC '78 and T. MILTON STREET, et al.,

vs.

ROUSE PHILADELPHIA, INC.,

and

GIMBEL BROTHERS, INC.;
GIMBEL BROTHERS REALTY CORP.,

and

REDEVELOPMENT AUTHORITY OF THE
CITY OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT
OF PENNSYLVANIA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The petition for *certiorari* should be granted to resolve the scope of constitutional protection afforded to non-labor picketing.

The lower court misapplied the unlawful purpose doctrine as enunciated in *Hughes v. Superior Court*, 339 U.S. 460 (1950) by prohibiting picketing which advocated a result which in itself was not illegal.

The court did not hold that all picketing held as part of a consumer boycott was illegal. It enjoined picketing in this case because it believed that the target was "innocent." In so holding, the court impermissibly inquired into the content of the speech as the basis for suppressing it.

Interest of Amicus

Amicus, The American Civil Liberties Foundation of Pennsylvania, an affiliate of the American Civil Liberties Union, is a non-profit corporation dedicated to the vindication of constitutional liberties in the Commonwealth of Pennsylvania. *Amicus* believes that the lower court opinions jeopardize the ability of the citizens of Pennsylvania to exercise freely their first amendment rights in Pennsylvania. It is, therefore, in *amicus'* interest for this court to grant *certiorari*, and review the propriety of the lower court rulings.

ARGUMENT

The lower courts in this case have held that the advocacy of a politically motivated boycott through picketing may be enjoined when directed at a target that the court considers to be innocent. In reaching this result, the courts engaged in flagrant content-based regulation prohibited under the Constitution and have blurred a delicate but critical distinction between permissible regulation of conduct and impermissible regulation of speech.

The courts below purported to base their decisions on the "unlawful purpose" doctrine—the power of the state to restrain picketing when it could legitimately prohibit the result sought by the picketing. See *Hughes v. Superior Court*, 339 U.S. 460 (1950). In a dangerous misapplication of that doctrine, the courts have restrained picketing, not because of the result produced, but because they disagreed with the protesters' judgment. The unresolved question of federal law presented to this Court on *certiorari* is whether the unlawful purpose doctrine may be properly applied to a case where the picketing would not have produced an action or result that was itself illegal, apart from the motive, reasons or viewpoint of the picketer. Unless this Court resolves that question in the negative, picketing will become subject to an unlimited range of invidious content-based regulations.

In *Hughes v. Superior Court*, 339 U.S. 460 (1950), the Court upheld an injunction issued against picketers of a supermarket, who urged customers not to patronize a store which refused to employ blacks proportionate to their numbers in the community. Emphasizing that "the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of ideas which are being disseminated," the Court held that unlike

"pure" speech, "picketing is not beyond the control of a State if the purpose which it seeks to effectuate gives ground for its disallowance." *Id.* at 465-66. Thus, as a corollary to the clear and present danger doctrine, the picketing may be restrained pursuant to the state's interest in preventing the action produced by the picketing. Since California could forbid "reverse" racial discrimination in hiring, it could restrain picketing which sought to produce such a result.

The lower courts in this case identified no comparable illegal result sought by the picketing. While the courts cited the state tort law against wrongful interference with a prospective contractual relationship, and the state's interest in the success of a government funded project, neither of these interests would be grounds for prohibiting the speech "irrespective of the nature of ideas" disseminated by the picketers.

The lower courts' finding that the advocacy of a boycott constituted a tortious interference under Pennsylvania law and could therefore be restrained simply disregarded the constitutional protection afforded commercial picketing. While the boycott urged by the protesters may have well jeopardized property interests of legitimate concern to the state, those interests must be accommodated with due regard for the constitutional rights of the protesters. *Cf., Thornhill v. Alabama,* 310 U.S. 88, 104 (1940) (while state has legitimate interest in regulating industrial relations, "[i]t does not follow that the state . . . may impair the effective exercise of the right to discuss freely . . . matters of public concern").

The tort of wrongful interference with a prospective contractual relationship is itself directed at speech activity and is not simply concerned with illegal conduct. Such direct restraints on speech will withstand constitutional

scrutiny only under limited circumstances, as outlined by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968). The Court there established a four part test to determine whether activity having attributes of both speech and conduct may be constitutionally restrained.

> (W)e think it clear that a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. The lower court decisions do not withstand scrutiny under the second, third and fourth parts of this test: the "property interests" protected are not sufficient to justify suppression of first amendment rights; the restraint is not content-neutral; and the injunction is grossly overbroad.

Mere injury to business does not provide a sufficient state interest to justify restraint of speech. Such a justification has been rejected not only in boycott cases, but in antitrust and defamation contexts as well. In *Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 49 U.S.L.W. 3216 (U.S. October 7, 1980), and *Henry v. First National Bank*, 595 F.2d 291 (5th Cir. 1979), the Eighth and Fifth Circuit Courts of Appeals both concluded that politically motivated consumer boycotts could be restrained by neither the federal antitrust laws *nor* state "tortious interference" laws.[1] *See*

1. The protesters in both *The National Organization for Women* case and the *Henry* case were charged with violations of

also, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (state interest in protecting personal reputations not sufficient to justify restraint of speech flowing from enforcement of strict liability defamation laws).

Such a rule is also implicit in *Thornhill v. Alabama*, 310 U.S. 88 (1940), which held that picketing of a commericial establishment is a protected form of speech. As all picketing of a business may tend to discourage customers from dealing with the business, the state must demonstrate something more than such an injury to justify the restraint of picketing.

The lower courts here have attempted to provide that additional state interest in their finding that the protesters' true grievance was with the government, and not with the businesses boycotted. Analogizing the case to secondary labor boycott cases, the courts determined that the state had a legitimate interest in protecting "innocent businesses" from being used as a "scapegoat" in a dispute for which they were not responsible.

In so holding, the courts violated the third part of the *O'Brien* test: the speech was restrained not on the basis of the result of the speech, but on the basis of the content of the speech. The court did not find that all consumer boycotts were tortious, but only those boycotts where the target was innocent of any wrongdoing. Such a distinction implicated the lower courts in the very inquiry foreclosed by the first amendment: a consideration of the value of the speech. *See Police Department v. Mosely*, 408 U.S. 92 (1972). The protesters here asserted that the

---

state tortious interference laws virtually identical to the Pennsylvania doctrine at issue here. *See* 620 F.2d at 1316, 1317; 595 F.2d at 303 n. 6. Both courts concluded that the states could not constitutionally prohibit conduct which, despite its intent to injure "innocent" businesses, was a protected form of petitioning the government.

black community should not patronize businesses that reaped the benefits of alleged misallocations of federal housing funds which would have otherwise gone to improve housing in black neighborhoods. The trial court did not question the sincerity of the protesters' political motivation, but simply disagreed that the businesses should be held accountable. The court thereby engaged in an impermissible judicial inquiry into the value of the speech.

The courts' reliance on secondary labor boycott cases as precedent for this type of content-based regulation is misplaced. The target of a secondary boycott is no more protected because he is "innocent" than a target of a primary boycott is not protected because he is "guilty." Rather, the crucial distinction is that the secondary labor boycott does not have, as its primary function, the communication of ideas. Despite the presence of non-speech elements, the picketing of a primary target is allowable because it serves a substantial communicative function—the dissemination of information concerning the facts of a labor dispute. *Thornhill v. Alabama*, 310 U.S. at 102. Secondary picketing serves no comparable communicative function. Picketing against a secondary target in the context of a labor dispute is not in any, but the most technical sense, the exercise of speech. It is rather the exercise of economic leverage used not to persuade or publicize but to coerce, coercion which could be conducted secretly as effectively as if conducted in public. *See* L. Tribe, American Constitutional Law, at 588 (1978) (test for determining whether regulation is directed at conduct or communication is whether activity sought to be regulated would be as objectionable if conducted in private as if conducted in public; if the activity would be objectionable if conducted in private then it can reasonably be asserted that regulation aimed at conduct and not speech). As such, a secondary labor boycott is less deserving of constitutional protection,

and does not outweigh the state's interest in protecting commerce, an interest which is not sufficient to justify restraint of true speech.

Thus, in commenting on the validity of secondary labor boycott prohibitions in *International Brotherhood of Teamsters v. Vogt, Inc.*, Justice Frankfurter noted that "this type of picketing certainly involved little, if any, communication." 354 U.S. 284, 290 (1957). *Cf., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949) ("appellants were doing more than exercising a right of free speech or press . . . they were exercising their economic power together with that of their allies to compel Empire to abide by Union rather than State regulation of trade."); T. Emerson, The System of Freedom of Expression, at 444-49 (1970), cited in *Carey v. Brown*, 100 Sup. Ct. 2286, 2293 (1980) (labor picketing can be subject to more regulation than political picketing since less concerned with communication.)[2] Therefore, while a court may examine whether or not the purported "exercise of free

2. Professor Emerson points out some of the important distinctions between labor and non-labor picketing. Labor picketing has a special economic impact because of its institutional setting. It is conducted by closely knit, powerful organizations that are able to isolate an employer economically by the tradition that union labor will not cross a picket line. It is supported by a system of bureaucratic power based upon common economic interests, loyalties, social pressures, and economic sanctions. Labor picketing is therefore not an appeal to persuasion but merely the basis upon which pre-existing institutional mechanisms are called into play.

A comparable institutional apparatus is absent from non-labor picketing. It is, as in this case, conducted by small organizations without economic resources who have a narrower claim to the loyalties of their members. They do not have a strategic position over the target nor can they rely upon automatic institutional loyalties to support the pressure which is applied. Their appeal is directed to the general public as opposed to their own members. Picketing in these circumstances is communicative because it is an appeal to reason rather than a "signal" for the application of economic coercion.

speech" is merely a "sham" to cover illegal or anticompetitive conduct, *see, e.g., American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 232 (1974) (state court could legitimately examine whether true motive of boycott was to publicize problem or merely to coerce target by inducing union employees to refrain from crossing picket line); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (no first amendment immunity from antitrust laws where activity is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor"), a court may not discriminate on the basis of whether or not it agrees with the content or tactics of the protest.[3] *Carey v. Brown*, 100 Sup. Ct. at 2291 (1980).

There is no question that the protesters' only motive here was communicative.[4] The court should not have been permitted to consider further the correctness of the protestors' political judgment in determining their right to advocate the boycott.

---

3. Because the lower courts engaged in prohibited content-based discrimination, this Court need not resolve whether or not a state may prohibit all consumer or political boycotts. Even if such a neutral blanket prohibition were constitutionally tolerable, the selective restraint of those boycotts with which the court disagrees can not be justified.

4. Indeed, the lower courts' analogy of this protest to a secondary labor boycott further breaks down on consideration of the absence of any non-communicative goal of the boycott. In contrast to a labor secondary boycott in which the principal purpose is to coerce a third party to exert his economic leverage on the primary target, the protesters here could not compel the boycotted businesses to exert any economic leverage on the "primary" target—the government. As the trial court acknowledged, the boycott was purely "symbolic," and the only advantage that could have been obtained from the boycott was the publicity and communication of the protesters' political conviction. Nothing in the trial court findings suggests that there was any other ulterior motive.

The courts' reliance on the fact that The Gallery was a government-funded project as grounds for restraining the boycott on "public policy" grounds is a clear example of the courts' fundamental misunderstanding of the "illegal purpose" doctrine. Contrary to the courts' apparent interpretation, the doctrine is not a *carte blanche* for the state to deem any picketing contrary to a government action as picketing for an "illegal purpose." Such an interpretation would stand the first amendment on its head by forbidding citizens from petitioning the government. Rather, the state's interest relied upon in restraining the picketing must be derived from a legitimate interest in prohibiting illegal conduct, independent of the existence of the picketing. While the government here might well have a substantial interest in the success of The Gallery, it could not make it illegal to refrain from patronizing the businesses there. Thus, picketing for the purpose of discouraging customers from patronizing The Gallery cannot be considered "for an illegal purpose."

If the state did have a legitimate interest in restraining the picketing it was because of the manner in which some of the picketing was conducted. *Amicus* does not quarrel with the interest of the state and of the respondents in insuring that the picketing would be peaceful and noncoersive. Rational limitations on the time, place, and manner of the picketing would have accommodated those interests without unduly interfering with the rights of the protesters. Instead, the Court enjoined all "picketing, handbilling, speechmaking, demonstrating, or taking any other action in support of [the] boycott" in the County of Philadelphia. Such a restraint was not directed solely at the coercive aspects of the protest, and impermissibly encroached upon pure speech. The injunction was, therefore, unconstitutionally overbroad.

CONCLUSION

For the foregoing reasons, *amicus*, American Civil Liberties Foundation of Pennsylvania, respectfully submits that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM T. COLEMAN, III
PEPPER, HAMILTON & SCHEETZ,
2001 The Fidelity Building,
Philadelphia, Pennsylvania 19109
(215) 893-3000

Attorney for Amicus Curiae, American Civil Liberties Foundation of Pennsylvania,

Of Counsel:
ALLAN R. STEIN
PEPPER, HAMILTON & SCHEETZ,
2001 The Fidelity Building,
Philadelphia, Pennsylvania 19109

THOMAS B. HARVEY, JR.
AMERICAN CIVIL LIBERTIES FOUNDATION OF PENNSYLVANIA,
260 South 15th Street,
Philadelphia, Pennsylvania 19102